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IN THE
Supreme Court of the United States
October Term, 1964

No. 6

AARON HENRY,

Petitioner,

v.

THE STATE OF MISSISSIPPI.

BRIEF FOR PETITIONER

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Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.
2. This case also involves Section 26, the Constitution of Mississippi:

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

3. This case also involves Section 23 of the Constitution of Mississippi:

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

4. This case also involves Section 1832, Mississippi Code of 1942, Ann. Rec.:

Practice in criminal cases—On affidavit of the commission of any crime of which he has jurisdiction lodged with a justice of the peace, he shall issue a warrant for the arrest of the offender returnable forthwith or on a certain day to be named and shall issue subpoenas for witnesses as in civil cases, and shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides.

5. This case also involves Section 1205, Mississippi Code of 1942, Ann. Rec.:

Papers transmitted to circuit clerk.

The justice of the peace, or mayor, or police court from whose judgment convicting of a criminal offense an appeal shall be taken, shall at once transmit to the clerk of the circuit court the bond taken by him and a certified copy of his record of the case, with all the original papers in the case, as in appeals in civil cases. If an appeal be taken from a judgment convicting of a criminal offense, during a session of the circuit court of the county, the transcript and papers shall be returned to, and the case triable at that term of the court, and the bond shall bind the defendant accordingly, and the clerk of the circuit court shall docket the case on the state docket, and shall be entitled to like fees as in other cases. The justice of the peace, mayor, or police justice shall be liable for the amount of the bond, if he fail to require a good and sufficient one. If the justice of the peace shall fail to make up his transcript of the record and transmit the same to the circuit clerk within ten days after the appeal-bond is given, the circuit court shall disallow his court costs in the case.

6. This case also involves Section 1200, Mississippi Code of 1942, Ann. Rec.:

Justice, mayor, or police justice to deliver papers to circuit clerk.

The justice of the peace, mayor or police justice of any city, town or village from whose decision an appeal shall be taken, shall at once transmit to the clerk of that court a certified copy of the record of the proceedings, with all the original papers and process in the case, and the original appeal-bond given by the appellant, and the clerk shall docket the same, and shall be entitled to the same fees, upon such appeals, as for similar services in suits originating in said court. The justice, mayor, or police justice of any city, town or village shall, at all times, be allowed to amend his return according to the facts.

7. This case also involves Section 1199, Mississippi Code of 1942, Ann. Rec.:

Copy of record to be transmitted.

The justice of the peace may prepare and certify his record to the following effect, viz.:

"Copy of the record of the proceedings before , a justice of the peace of county, in district No. of said county, in the case therein set forth, to wit: (here copy the entries on the docket, and certify as follows, viz.):

"State of Mississippi, County:

"I, a justice of the peace of the said county, certify that the foregoing is a copy of the record of the proceedings before me in the case stated therein, as appears on my docket.

"Given under my hand, this the day of , A. D. , , J. P."

8. This case also involves Section 1987, Mississippi Code of 1942, Ann. Rec.:

Judgment not to be reversed for certain errors.

A judgment in a criminal case shall not be reversed because of transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, or because of any error or omission in the case in the court below, except where the errors or omissions are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court. And no judgment in any case originating in a justice court, or in a municipal court, and appealed to the circuit court, shall be reversed because it may appear in the Supreme Court transcript that the judgment or

record of the said justice or municipal court was not properly certified or was not certified at all, or was missing in whole or in part, unless the record further shows that objection on that account was made in the circuit court, in the absence of which objection in the circuit court there shall be a conclusive presumption that the defects in this clause mentioned did not exist in the circuit court proceedings: Provided however, that the foregoing clause shall not apply to cases wherein a record in the Supreme Court of the transcript from the justice or municipal court is necessary to a fair understanding of the proceedings in the circuit court.

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BRIEF FOR PETITIONER

The Opinion Below

The first opinion of the Supreme Court of Mississippi (R. 200-211), reversing the judgment of the County Court for the Second Judicial District of Bolivar County, Mississippi was originally reported at 154 So. 2d 289. It has been withdrawn and the second opinion of the Supreme Court of Mississippi (R. 234-245) affirming the judgment of the trial court is now reported at 154 So. 2d 289, the citation of the former opinion.

Jurisdiction

The first judgment of the Supreme Court of Mississippi was entered on June 3, 1963 (R. 211). Following a Suggestion of Error (R. 212) submitted by the Attorney General on June 12, 1963, the first opinion and judgment of the court were withdrawn (R. 245) and a second judgment entered on July 12, 1963. Petition for writ of certiorari was filed on October 10, 1963, and was granted on February 17, 1964.

Questions Presented

1. Whether a criminal conviction based upon evidence, secured as the fruits of an illegal search and seizure, which forms crucial support for that conviction is inconsistent with Fourteenth Amendment due process proscriptions, where admission of the evidence was challenged in a motion for directed verdict rather than an objection.

2. Whether the due process and equal protection clauses of the Fourteenth Amendment are offended by a criminal conviction lacking jurisdiction by reason of an absent affidavit invalidating, as a consequence, the arrest of petitioner.

3. Whether a state, which has resorted to short-cut procedures in derogation of petitioner's constitutional rights, to achieve his arrest and conviction, and to the use of its criminal and judicial process as a punitive measure, for the enforcement of segregation and the interference with freedom of speech and association, is guilty of an abuse of process and an overall denial of due process and equal protection of the laws guaranteed by the Fourteenth Amendment.

Statement

1. Prior Proceedings

Petitioner, a pharmacist and president of the Coahoma County Branch of the National Association for the Advancement of Colored People, resides in Clarksdale, Mississippi (R. 161). He was convicted by the County Court of Bolivar County for disturbing the peace under Section 2089.5, Mississippi Code 1942, Ann. Rec. (R. 161). Petitioner appealed to the Circuit Court of Bolivar County and then to the Supreme Court of Mississippi (R. 189). The Supreme Court reversed on the ground that evidence necessary to sustain the conviction was obtained as the result of an illegal search and that petitioner's rights were impaired to the extent of a denial of a fair trial, and

remanded the case for a new trial (R. 200-211). Upon a Suggestion of Error filed by the State Attorney General, the Mississippi Supreme Court withdrew its opinion, found that although an illegal search was committed, petitioner had waived his right to predicate error upon the use of the illegally obtained evidence and affirmed the judgment of conviction (R. 212; 234-246). On February 17, 1964, this Honorable Court issued a writ of certiorari to the Supreme Court of the State of Mississippi to review this judgment.

2. The Evidence Presented

Petitioner was arrested on March 3, 1962, and taken into custody by the Chief of Police of Clarksdale, Coahoma County, Mississippi for the offense of disorderly conduct allegedly committed in Bolivar County, Mississippi (R. 62, 92-94, 136). On March 14, 1962, petitioner was tried before a Justice of the Peace, found guilty of disturbing the peace, fined \$500 and sentenced to six months in jail (R. 1). An appeal was taken to the County Court of the Second Judicial District of Bolivar County, Mississippi, where trial de novo resulted in petitioner's conviction for violation of Section 2089.5, Mississippi Code 1942, Ann. Rec. (R. 189-190). In both instances, trial was based upon an affidavit signed by the Bolivar County Prosecutor, neither on personal knowledge nor information and belief (R. 3). The Justice of the Peace, before whom petitioner was tried, certified to the County Court that all original papers in this action were contained in the record of proceedings before him, as required by Section 1205, Mississippi Code of 1942, Ann. Rec. Certified to the County Court as original papers were one cost bond, one appeal bond, eight subpoenas *duces tecum*, one *capias* and one general affidavit dated March 14, 1962 (R. 1).

The only witness testifying to commission of the offense was complainant, Sterling Lee Eilert, who was 18 years of age at the time of the offense and had terminated his edu-

cation while in the tenth grade (R. 26-27). On March 3, 1962, he left his home in Memphis, Tennessee in order to "hitch-hike" to Cleveland, Mississippi (R. 15, 28).

After having ridden in three cars, he arrived in Clarksdale and at approximately 5:30 p.m. a Negro gave him his next ride, south along Highway 61 (R. 16-17). Eilert was at all times seated next to the car door (R. 40). The driver volunteered to go past Alligator, where he worked in a liquor store, and on to Shelby (R. 38). As they entered Shelby, the driver allegedly reached across and "grabbed" [Eilert's] "crotch" (R. 22).

Eilert left the car, attempted a telephone call and walked approximately one block to the Shelby police station (R. 23). As he left the telephone booth, he saw what he judged to be the same car turn from the east or west to the north, towards Alligator and Clarksdale (R. 25). Eilert then reported the incident to two police officers, one from Shelby and one from Clarksdale, and described the car as a "Star Chief" with red and black or red and brown upholstery, and the license plate as containing a prefix and the digits 1769 (R. 43). He described the driver to the police as an educated Negro, 5'10" tall, heavy set, short hair, and well dressed, with either dark grey or dark brown rather than blue or black slacks (R. 43; 49; 51). In a prior statement to the police, however, Eilert had described the driver as wearing a grey sport coat, dark or cream brown slacks, a solid colored sport shirt and no tie (R. 52; 159).

Charles Reynolds, a Clarksdale policeman who was then in Shelby listened to Eilert's statement and immediately concluded that Aaron Henry was the man (R. 84). Reynolds testified that he knew petitioner in connection with his activities with the N.A.A.C.P. (R. 78). Eilert confirmed that Reynolds had assumed petitioner's guilt and remarked about his association with the N.A.A.C.P. Eilert testified that the police officers "knew who I was talking about right away", that "he was associated with N.A.A.C.P. or something" (R. 159).

Reynolds testified that he was familiar with petitioner's car and that he requested from the Clarksdale authorities identification of a vehicle bearing a license including the partial number allegedly reported by Eilert (R. 72; 79; 74). Although this number was issued by 82 counties in Mississippi, each identified by a different prefix, (R. 69) the officers checked only Coahoma County, the county in which Clarksdale was located and in which petitioner lived (R. 69). The officers supplied the prefix for Coahoma County and the partial number was matched with that of petitioner's car (R. 74).

All of the foregoing activities, including a 20-mile drive from Clarksdale to Shelby through several towns, at a speed no faster than 40-45 m.p.h. had, accordingly, transpired in approximately 25 minutes—from 5:30 to 5:56 p.m. (R. 33-34; 88).

At 5:56 p.m. Reynolds received identification of the person to whom the license number was issued and at 6:04 p.m. he reported to Clarksdale authorities that a warrant had issued for petitioner's arrest (R. 88-89). Eilert was then driven to the Clarksdale police station where he gave another statement, tape recorded by Coahoma County Prosecutor Pearson (R. 44).

Shortly before 7:00 p.m., petitioner was awakened, arrested at his home and brought to the Clarksdale police station by the Clarksdale Chief of Police (R. 94; 163). Petitioner was told he was being arrested for "misconduct" in "Mound Bayou" (R. 164), a town south of Shelby and south of the route Eilert had been traveling. Another warrant appeared in the County Court proceedings and the original was never produced, although demanded by the petitioner (R. 56; 170-171).

Petitioner was the only person presented to Eilert for identification and was so identified (R. 45). Eilert further testified that at the police station, petitioner was wearing dark trousers, a gold cardigan sweater and a white shirt

open at the collar, and that these clothes were the same as those the driver of the car had been wearing (R. 49-51); this description differed from his earlier statement (R. 43; 49).

Later that evening while petitioner was in custody the Police Chief and arresting officers returned to petitioner's house, obtained the keys to his car from his wife and entered the car. The Police Chief testified that the cigarette lighter was inoperable and that "dentyne" (sic) chewing gum wrappers were found in the ash tray at the right hand side of the dashboard (R. 98). At some point in the evening after Eilert gave his second statement, he "remembered" that the cigarette lighter in the car in question did not work and the ash tray at the right end of the dashboard contained "dentyne" (sic) chewing gum wrappers (R. 52-53). This information was not a part of his previous statement to the police (R. 52-53), and Eilert, in describing gum wrappers, did not mention any brand name (R. 86).

At the time of his arrest petitioner gave a voluntary statement to the police consistent with his testimony at trial (R. 95-96). He is a pharmacist, has been since 1950, is married and has an 11-year old daughter (R. 161). On March 3, 1962, he was working in his drugstore in Clarksdale between 3 and 4:45 in the afternoon. He then went to the Delta Burial Corporation office in Clarksdale and remained there talking to various persons until 5:30, when he went home (R. 162). He left the drug store wearing a black coat and navy trousers (R. 168). He arrived at home within five or ten minutes, ate dinner and went to bed to rest before a meeting scheduled for 7:30 that evening. Shortly before seven, he was arrested (R. 162-163).

Ministers and educators testified to petitioner's moral character and petitioner testified, without contradiction, that he had normal domestic relations with his wife, a normal relationship with his daughter, and was without any homosexual tendencies (R. 135; 167; 174-180).

Petitioner's presence in Clarksdale between 4:45 p.m. and 7:00 p.m., the time of his arrest, was established by six witnesses. Between 4:45 and 5:20 p.m. he was at the Delta funeral home engaged in conversation with four of those witnesses. At that time he was wearing a black coat, dark trousers, a white shirt and a tie (R. 114-118; 148-149). He reached his home at approximately 5:30 p.m. where he talked to two other witnesses and to his wife and daughter. He was described as wearing navy or black trousers, a dress coat and a tie. Petitioner did not leave his home until the time of his arrest (R. 119-120; 125-126; 129; 132-133).

Summary of Argument

A judicial determination that an illegal search and seizure produced evidence crucial to a conviction and resulted in the denial of a fair trial, sanctioned by affirmation of that conviction, is such a profound denial of due process of law that neither application of a rule of waiver nor the presence of competent counsel can overcome the inherent constitutional violations. This thesis is consistent with the decision in *Brown v. Mississippi*, 297 U. S. 278. The case at bar is more compelling since the Mississippi Supreme Court's finding of waiver was based upon the time of an objection rather than a complete lack of objection. Since waiver of constitutional rights is not lightly inferred, *Ohio Bell Telephone Co. v. Commission*, 301 U. S. 292; *Johnson v. Zerbst*, 304 U. S. 458, and every reasonable presumption against waiver is indulged by the courts, *Emspack v. United States*, 349 U. S. 190, petitioner's objection to use of unconstitutionally acquired evidence which took the form of a motion for directed verdict, may not be construed as a voluntary and knowing waiver of a constitutional right. Moreover, where fundamental constitutional rights are involved, the courts will not rigidly apply procedural rules to the derogation of constitutional rights. *Brown v. Mississippi*, *supra*, *Fay v. Noia*, 372 U. S. 391.

Although the court below did not dispose of the case at bar on the basis of federal questions raised before it, the decision on state grounds does not preclude review by this Court which must decide whether that decision is consistent with due process requirements of the Fourteenth Amendment. *Lynum v. Illinois*, 372 U. S. 528; *Ker v. California*, 374 U. S. 23; *Fahy v. Connecticut*, 375 U. S. 85; *Powell v. Alabama*, 287 U. S. 45. Since freedom from the use of illegally acquired evidence and coerced confessions is guaranteed by the Fourteenth Amendment, *Mapp v. Ohio*, 367 U. S. 643; *Malloy v. Hogan*, 378 U. S. 1, the decision of the court below must be consistent with constitutional safeguards implicit in the Fourteenth Amendment. Federal decisions concerning illegally acquired evidence have employed the waiver principle when objections to the use of that evidence have been "untimely" but where fundamental issues are involved, constitutional considerations are given precedence over procedural rules to remedy manifest injustice. *Amos v. United States*, 255 U. S. 313.

The State of Mississippi may not erect procedural barriers to the determination of constitutional rights. *Davis v. Wechsler*, 263 U. S. 22. Since the State of ~~Mississippi~~ Mississippi does not consistently apply the procedural rule upon which it has disposed of the case at bar, particularly where fundamental rights are involved, the state may not make novel application of a procedural rule binding on petitioner, in the guise of an independent state ground for its decision.

Conviction by the court below is further impaired by the trial court's lack of jurisdiction. That jurisdiction is derivative from the Justice of the Peace Court whose certified record lacked the affidavit required by statute upon which the commencement of prosecution of petitioner might validly be based. *Ratcliff v. State*, 119 Miss. 866, 26 So. 2d 69. Lack of that affidavit rendered the arrest of petitioner unconstitutional. *Aguilar v. Texas*, 378 U. S. 108.

Viewed in its entirety, the proceedings below lacked that fundamental fairness essential to our concept of due process of law. The activities of state authorities, the atmosphere in which the trial was conducted and the subsequent disposition of the cause by the Supreme Court of Mississippi, following submission of a Suggestion of Error by the Attorney General of Mississippi, are persuasive that state judicial and criminal process has been utilized as a punitive measure, as a deterrent to the exercise of freedom of association and speech and as a means to enforce racial segregation.

ARGUMENT

I

A Criminal Conviction, Which Rests Upon Evidence, Judicially Determined to Have Been Obtained in Violation of Petitioner's Constitutional Rights And to be the Sole Support of That Conviction, Offends the Due Process Clause of the Fourteenth Amendment.

In its original opinion reversing the conviction of petitioner, the Supreme Court of Mississippi determined that local police authorities committed an unreasonable search and seizure and thus acquired evidence crucial to the conviction. It concluded that "[T]he admission of the evidence obtained by the search of defendant's automobile thus prevented him from obtaining a fair trial . . ." (R. 207, 210). Following the submission of a Suggestion of Error by the Attorney General of Mississippi, the court below, although adhering to its decision that an illegal search and seizure had been committed, sought to obviate disposition of the due process issue by resort to rigid application of a rule of waiver, not based upon failure to object to illegally seized evidence, but upon a delay in interposing that challenge.

Rules of practice, without regard to their applicability, cannot obscure the error inherent in petitioner's conviction, and the denial of a fair trial as contemplated by the due process clause of the Fourteenth Amendment which incorporates the Fourth Amendment's interdiction against unreasonable search and seizure and the Fifth Amendment's proscription against compulsory self-incrimination. *Weeks v. United States*, 232 U. S. 383; *Wolf v. Colorado*, 338 U. S. 25; *Mapp v. Ohio*, 367 U. S. 643; and *Malloy v. Hogan*, 378 U. S. 1.

The thesis implicit in the *Weeks*, *Wolf* and *Mapp* cases reached maturity in *Malloy v. Hogan*, *supra*, which made the proscription against compulsory self-incrimination binding on the state through the Fourteenth Amendment. The constitutional philosophy underlying these cases is clear. Protection from unlawful intrusion and appropriation of property by police officers and the subsequent utilization of that property to secure a criminal conviction is so alien to the concepts of liberty embodied in the Constitution that to permit a state to obtain a conviction by such means would be to acquiesce in attenuated due process.

Prior to the decisions in *Mapp v. Ohio*, *supra*, and *Malloy v. Hogan*, *supra*, this Court in *Brown v. Mississippi*, 297 U. S. 278, reversed a conviction secured by means of a coerced confession and declared that where Fifth Amendment guarantees are so implicit in our concept of fundamental fairness, and unequivocal and patent violations of due process had been committed by a state in securing a conviction, it was incumbent upon the trial court to furnish the protection guaranteed by the Fourteenth Amendment. The interdependence and supplementary character of Fourth and Fifth Amendment rights was noted by this Court as early as 1886 in *Boyd v. United States*, 116 U. S. 616, where it declared that the concept of an unreasonable search and seizure must be defined in terms of the right to be free from compulsory self-incrimination. The result in the *Brown* case inhered despite defendant's failure to move

to exclude the unconstitutional evidence. The fact that *Brown* was a capital case, revolting to the most elementary concepts of human behavior is not material, since resolution of the case at bar must turn on whether petitioner's constitutional right to due process of law has been violated, rather than the extent of the violation. *Mapp v. Ohio*, *supra*; *Fahy v. Connecticut*, 375 U. S. 85. See also *Gideon v. Wainwright*, 372 U. S. 335, and the concurring opinion of Clark, J. at page 349 and *Malloy v. Hogan*, *supra*. Where, as here, a denial of due process is clear, a court is not relieved of its obligation to protect constitutional rights and to accord requisite due process of law. In *Brown v. Mississippi*, *supra*, this Court held that permitting a conviction and pronouncing sentence by a court which knew there was no lawful evidence upon which conviction could be based, rendered that conviction void for want of the essential elements of due process. Similarly, in *Weeks v. United States*, *supra*, this Court held that violation of the proscription against unreasonable search and seizure should find no sanction in affirmance of convictions by courts. *Boyd v. United States*, *supra*, cautioned the courts to be aware of their duty to be watchful of the constitutional rights of the citizen against any stealthy encroachment of the state, and *McNabb v. United States*, 318 U. S. 332, held that a conviction secured in flagrant disregard of constitutional rights cannot be allowed to stand without making the court an accomplice to the constitutional infraction. Thus, it is clear that the duty to remedy constitutional violations evolves upon the court as the final arbiter of fundamental rights where those violations are manifest. The trial court, to whose attention the constitutional violation was called, and the court below, which acknowledged commission of an illegal search and seizure resulting in evidence crucial to the conviction and a fundamental denial of due process of law, together and separately have violated the Fourteenth Amendment's proscription against denying fundamental fairness in criminal proceedings. As in *Amos v. United States*, 255 U. S. 313, where a determination that constitu-

tional rights had been waived by a late objection was reversed by this Court, the constitutional violation, "literally thrust upon the attention of the court" required that court to protect defendant's rights. By their nature, rights defined as due process guarantees are part of the fabric of our society which assure the protection and preservation of principles so basic as to inhere in our concept of liberty and to be implicit in our accusatorial system of criminal jurisprudence. When a violation of these rights is clearly and unequivocally placed before a trial court, an appellate court may not sanction abdication from the obligation to protect those rights.

The case before this Court requires no determination of whether the search was unreasonable. The Supreme Court of Mississippi conceded that search by the Clarksdale Chief of Police to be illegal and in violation of the Mississippi Constitution, the language of which is identical to that of the Federal Constitution. In *Tucker v. State*, 128 Miss. 211, 90 So. 854, the Supreme Court of Mississippi declared the Fourth Amendment of the United States Constitution and Section 23 of the Mississippi Constitution to be "identical in purpose and substance" as are the federal Fifth Amendment and Section 26 of the Mississippi Constitution regarding self-incrimination.

Prior to that line of cases commencing with *Mapp v. Ohio*, *supra*, and *Gideon v. Wainwright*, *supra*, this Court held repeatedly that where proceedings in a state court do not meet basic requirements of fundamental fairness consistent with essential principles of ordered justice implicit in our concept of jurisprudence, a conviction must be reversed as violative of the due process clause of the Fourteenth Amendment. See *Brown v. Mississippi*, *supra*; *Powell v. Alabama*, 287 U. S. 45. The abortive procedures followed by the state authorities together with the inaction of the trial court and affirmance by the court below, establish a pattern of attenuated "due process" repugnant to

petitioner's rights guaranteed by the due process clause of the Fourteenth Amendment.

2. The Supreme Court of Mississippi declined to determine federal constitutional questions raised before it and preferred to rest its decision on its state constitution. Although the court below is the final arbiter of what the state law is, this Court must decide whether that determination is consistent with the due process guarantees of the Fourteenth Amendment. *Powell v. Alabama*, *supra*; *Douglas v. California*, 372 U. S. 353; *Draper v. Washington*, 372 U. S. 487, *Lynum v. Illinois*, 372 U. S. 528; *Ker v. California*, 374 U. S. 23; *Fahy v. Connecticut*, *supra*; *Aguilar v. Texas*, 378 U. S. 108. Without regard to the label applied by the state as a basis for its decision, where federal constitutional rights are at issue, review by this Court is necessary to determine whether those federal rights have been adequately protected.

Boyd v. United States, *supra*, defined the fruits of an illegal search and seizure as unconstitutional evidence. *Wolf v. Colorado*, *supra*, secured to defendants prosecuted by the state the right to be free from unreasonable searches and seizures; *Mapp v. Ohio*, *supra*, imposed the exclusionary rule upon state courts and *Malloy v. Hogan*, *supra*, recognized, as a part of the Fourteenth Amendment, the concomitant privilege against compulsory self-incrimination. By isolating, as a decision based upon state law, the determination below which supports the use of illegally secured evidence to incriminate a criminal defendant, those cases recognizing the right to be free from the use of illegally seized evidence and coerced confessions as a part of the Fourteenth Amendment's due process guarantees are rendered sterile.

In addition to protecting the right of privacy, the Fourth Amendment seeks to avoid the use of illegally obtained evidence, *Silverthorne v. United States*, 251 U. S. 385, for it is the use of that evidence which results in a

denial of due process of law, *Weeks v. United States, supra*. Thus, it is the evidence which is so tainted, that its use vitiates rights violated in its acquisition and renders nugatory constitutional guarantees. Accordingly, the *Weeks, Wolf, Mapp* and *Malloy* cases, are persuasive authority for reversal of the decision below.

What is dismissed by the court below on the basis of a "procedural rule", requires in fact, a substantive determination of a federal right. As early as *Brown v. Mississippi, supra*, this Court declared on page 285:

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."

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But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law.

In *Fay v. Noia*, 372 U. S. 391, a habeas corpus proceeding, this Court stated at page 431:

In *Noia's* case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal.

In *Lynum v. Illinois, supra*, where the state supreme court found admission of a coerced confession to be harmless error because of the existence of additional evidence sufficient to sustain the conviction, this Court termed application of that "harmless error" rule "impermissible doctrine" and held that admission of the confession vitiated the judgment despite the other evidence.

Fahy v. Connecticut, supra, provides the framework within which this "procedural" question must be evaluated. The state court, in affirming a conviction, applied the rule of "harmless error" and directed its attention on appeal to whether the concededly illegally seized evidence contributed to the conviction. This Court held the question properly before the court to be whether there was a reasonable possibility that the evidence complained of *might* have contributed to the conviction rather than whether there was sufficient additional evidence upon which the petitioner could have been convicted. The "cumulative prejudicial effect of the evidence" upon the conduct of the defense was deemed significant.

The thesis evinced in *Fahy* is consistent with the prior decision in *Ker v. California, supra*, where a decision that a search and seizure was reasonable was reviewed to determine whether the state's evaluation was consistent with requirements of the federal Constitution.

These cases demonstrate that denomination of a rule as "procedural" does not preclude review by this Court where substantive federal rights are enmeshed in and disposed of by the state's determination of the procedural question. Invocation of the waiver principle by the court below is analogous to the "harmless error" doctrine applied in *Lynum v. Illinois, supra*, and *Fahy v. Connecticut, supra*, and this Court must measure application of the state rule against constitutional requirements. A contrary conclusion will create a paradox similar to that which followed *Weeks v. United States, supra*, and *Wolf v. Colorado, supra*. *Weeks*, which held that because freedom from unreasonable searches and seizures secured by the Fourth Amendment to the United States Constitution was of such a fundamental nature as to be implicit in the Fourteenth Amendment, was followed by *Wolf* which recognized that the nature of the Fourth Amendment right was a part of our concept of ordered liberty and, there-

fore, binding upon the states, but which failed to proscribe state use of illegally acquired evidence, thereby acknowledging a right but according no remedy. Moreover, a contrary conclusion will be inconsistent with this Court's statement in *Malloy v. Hogan, supra*, that the *Mapp* decision established the privilege against self-incrimination as having constitutional force and therefore being more than a rule of evidence.

(3) That the foregoing decisions look to Fourth and Fifth Amendment cases commenced in federal courts for delineation of the rights involved imposes no impediment to reversal of the conviction below. Although those decisions concerning the use of illegally obtained evidence reflect a requirement for "timely objection", an analysis of authorities evidences the application of two principles.

First, provision in the Federal Rules of Criminal Procedure for a pre-trial motion to suppress evidence is proposed to avoid interrupting a trial and to assure an orderly proceeding. Second, although objection upon submission of the evidence is necessary where a defendant is without knowledge of the existence of unlawfully acquired evidence, where, as in *Brown v. Mississippi, supra*; *Lynum v. Illinois, supra*; and *Williams v. Georgia*, 349 U. S. 375, fundamental rights are abridged, the constitutional violation is patent and clear, or the conviction is solely supported by unlawfully acquired evidence, the merits of the cause are disposed of, despite an "untimely objection". The courts act to correct "plain error" or to relieve "manifest injustice". *Amos v. United States, supra*; *Gambino v. United States*, 275 U. S. 310; *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955); *Contee v. United States*, 215 F. 2d 324 (D. C. Cir. 1954); *United States v. Barillas*, 291 F. 2d 743 (2nd Cir. 1961); *Williams v. United States*, 263 F. 2d 487 (D. C. Cir. 1959); *Ganci v. United States*, 287 F. 60 (2nd Cir. 1923). See also *United States v. Ascendio*, 171 F. 2d 122 (3rd Cir. 1948).

The federal courts have exhibited flexibility in the application of this procedural rule, imposition of which rests within the discretion of the court. That discretion is exercised where rigid adherence to procedural doctrine would defeat constitutional rights. *Gouled v. United States*, 255 U. S. 298, 306. This thesis has been expressed by this Court in the *Gouled* case at pages 312-313:

While this [timeliness of motion] is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. . . . A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

See, in accord, *Chapman v. United States*, 365 U. S. 610; *Jones v. United States*, 362 U. S. 257; and *Gallegos v. United States*, 237 F. 2d 694 (10th Cir. 1956).

The decision that petitioner had waived his constitutional rights, by a court which acknowledged commission of an illegal search and seizure, and that unlawfully acquired evidence was crucial to an unimpeachable conviction resulting in a consequent denial of fundamental due process of law, is in conflict with this Court's determination that waiver of constitutional rights is not lightly inferred. *Ohio Bell Tel. Co. v. Commission*, 301 U. S. 292; *Johnson v. Zerbst*, 304 U. S. 458, 464; *Smith v. United States*, 337 U. S. 137, 150; *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 395; *Hodges v. Easton*, 106 U. S. 408. Every reasonable presumption against such a waiver is indulged, *Emspäck v. United States*, 349 U. S. 190; *Johnson v. Zerbst*, *supra*; *Agnello v. United States*, 269 U. S. 20; *Gouled v. United States*, *supra*. Petitioner's motion for directed verdict, which raised the issue of illegal search and seizure and gave the trial court ample opportunity to cure the error, is sufficient to overcome any presumption created by the Supreme Court of Mississippi's interpretation of its rule.

4. Disposition of this case by the Supreme Court of Mississippi on state procedural grounds does not preclude review by this Court which must determine whether protection has been accorded federally guaranteed rights. Although each state may decide those methods for protection of state accorded rights, it may not, by application of local procedural principles, infringe upon rights created and guaranteed by the federal constitution. *Wright v. Georgia*, 373 U. S. 284; *Fay v. Noia*, *supra*.

The court below held that the "long established" procedural rule of the state required a prejudiced party to object to the introduction of inadmissible evidence when offered, that petitioner had waived his right to object and that the failure of the trial judge to exclude unconstitutional evidence was not error. As in the federal cases, the purpose of this procedural rule is to secure an orderly trial and not to alter substantive rights.

In applying its rule, the court below failed to distinguish between decisions regarding general evidence and those dealing with constitutional issues. Accordingly, *Peters v. State*, 106 Miss. 333, 63 So. 206; *Baggett v. State*, 219 Miss. 383, 69 So. 2d 150; and *Holmes v. State*, 146 Miss. 351, 111 So. 860, cited by the court below are inapposite. Whereas a state court may establish rules concerning the admissibility of hearsay or otherwise incompetent testimony, it may not apply those rules to abridge rights within the protection of the Fourteenth Amendment to the United States Constitution.

Although the opinion below referred to a "long established procedural rule" of undeviating application of the waiver principle, examination of Mississippi cases reflects this policy to be tempered by discretionary exceptions where fundamental rights are at stake. *Brooks v. State*, 209 Miss. 150, 46 So. 2d 94; *Carter v. State*, 198 Miss. 523, 21 So. 2d 404; *Fisher v. State*, 145 Miss. 116, 110 So. 361.

Moreover, the court below has considered constitutional questions on appeal although objections were untimely or improperly raised. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198; *Brooks v. State*, *supra*; *Fisher v. State*, *supra*. Affirmance of the conviction represents both an abuse of discretion and a failure to apply existing state law, and requires this Court to review the facts of the case at bar and to insure protection of constitutional rights. *Williams v. Georgia*, *supra*.

In those cases where Mississippi has applied a waiver principle, the issue which had not been raised at the appropriate time, required a determination of the existence of probable cause supporting a warrant, an arrest or a search. *White v. State*, 202 Miss. 246, 30 So. 2d 894; *Harris v. State*, 153 Miss. 1, 120 So. 206; *Johnson v. State*, 220 Miss. 452, 70 So. 2d 926; *Jenkins v. State*, *supra*; *Bailey v. State*, 143 Miss. 210, 108 So. 497. Since issuance of a warrant is conclusive as to the existence of probable cause, *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 438; *Carr v. State*, 187 Miss. 535, 192 So. 569, the search or arrest must be attacked on the basis of the adequacy of the warrant which, in turn, requires that issue to be raised for determination at the trial level. As a practical matter, a record on appeal does not afford a basis for consideration of the question. Similarly, probable cause for a search or for an arrest without a warrant must be considered initially at the trial level, if sufficient facts for evaluation are to emerge. *McNutt v. State*, 143 Miss. 347, 108 So. 721; *Smith v. State*, 240 Miss. 738, 128 So. 2d 857; *Williams v. State*, 171 Miss. 324, 157 So. 717.

Only in *Brooks v. State*, *supra*, and the case at bar, is it clear from the record that the search was illegal, and the necessity for the trial court to conduct further inquiry obviated. In both cases there was no search warrant, the search was not incident to, but after an arrest, *Martin v. State*, 217 Miss. 506, 64 So. 2d 629; *Millette v. State*, 167 Miss.

172, 148 So. 788, and the evidence was obtained without any pretense of probable cause or reasonableness vital to a valid conviction.

After judicially determining commission of an illegal search resulting in the evidence which supported the conviction and a consequent denial of fundamental fairness, the court below cannot escape the consequences of its conclusions. Having made these determinations, the competency of counsel becomes irrelevant to violation of petitioner's constitutional rights. In both *Carter v. State, supra* and *Fisher v. State, supra*, the court below reversed convictions because fundamental rights were violated, even though the questions were neither raised during trial nor preserved for appeal. That counsel was present and competent did not mitigate against review by the court.

Accordingly, this case falls within the principle of *Davis v. Wechsler*, 263 U. S. 22, where this Court stated:

[w]hatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

See also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 682; *Rogers v. Alabama*, 192 U. S. 266; *Williams v. Georgia, supra*; *Urie v. Thompson*, 337 U. S. 163; *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276, 282; *Broad River Power Company ex rel. Daniel*, 281 U. S. 537; *New York Central v. New York and Penn. Co.*, 271 U. S. 124; *Ward v. Love County*, 253 U. S. 17.

In *Fay v. Noia, supra*, this Court stated:

A choice made by counsel not participated in by the petitioner does not automatically bar relief, nor does a state court's finding of waiver bar independent determination of the question by the federal courts

..., for waiver affecting federal rights is a federal question.

The estoppel issue relied upon by the court below is fallacious. Petitioner is not estopped by efforts to determine how evidence, of which he was unaware, was obtained. Moreover, when the trial court declined to rule favorably on petitioner's objection to use of the evidence, it was incumbent upon him to defend the case in that posture.

Prior to this case, Mississippi had not decided whether the constitutional privilege against unreasonable searches could be waived by the wife of an accused, hence it was necessary to offer proof refuting that any such waiver had occurred. Refusal of the trial court to suppress the illegally acquired evidence raised for jury determination the significance and existence of that evidence and required petitioner to defend that issue. The Mississippi decisions do not lend support to its application of the estoppel principle since each involved a damaging confession or admission of a defendant which occurred during trial, *Weatherford v. State*, 164 Miss. 888, 143 So. 853; *Smith v. State*, 166 Miss. 893, 144 So. 471; *Prine v. State*, 158 Miss. 435, 130 So. 687; *Spivey v. State*, 212 Miss. 648, 55 So. 2d 404; *Musslewhite v. State*, 212 Miss. 526, 54 So. 2d 911; an explicit agreement of counsel, *Sykes v. City of Crystal Springs*, 216 Miss. 18, 61 So. 2d 387; or initial introduction by the defendant of the evidence later objected to, *Barnes v. State*, 164 Miss. 126, 143 So. 475.

The decision below elevates technical rules of procedure which lack a substantive purpose and subverts constitutional rights in order to achieve a predetermined result, the conviction of petitioner. Further, while recognizing the illegally acquired evidence to be essential to a valid conviction, it sanctions the error committed by the trial court which ignored a constitutional violation, called to its attention by motions for directed verdict.

The admonition in footnote 9 of *Mapp v. Ohio, supra*, indicating that state procedural rules were not obviated by that decision, furnish no validity to the decision below. Having found the search illegal and the use of evidence acquired as a result of that search a denial of due process of law, the court, by imposition of a rule of waiver denominated as "procedural" (R. 243), has sought to escape its obligation to insure due process of law in criminal proceedings and to decide implicit and unavoidable federal questions.

The essence of the case at bar concerns the breadth of protection afforded by the Fourth and Fifth Amendments as facets of the Fourteenth Amendment. The issues are federal in character and require that this Court determine whether federally guaranteed rights have received the protection intended by the United States Constitution. The acknowledgment of a lack of due process by the court below is fatal to the soundness of the second opinion and requires reversal in order to preserve our system of jurisprudence.

II

An Unlawful Arrest And a Conviction by a Court Lacking Jurisdiction Are a Denial of Due Process And Equal Protection Guaranted by the Fourth And Fourteenth Amendments.

The trial court's refusal to require production of all records of the justice of the peace before whom petitioner was initially tried and the affirmance by the court below on the grounds that, a missing affidavit may be amended, evidences acquiescence by the Supreme Court of Mississippi in the local and county authorities' casual disregard for both the requirements of Mississippi law and the federal constitutional rights of the petitioner.

A criminal trial by a court of competent jurisdiction is a primary requirement of due process of law guaranteed by the Fourteenth Amendment of the United States Con-

stitution. The foundation of the jurisdiction of the justice of the peace court is the affidavit described in Section 1832 of the Mississippi Code of 1942 Ann. Rec. which pro-

Practice in criminal cases.—On affidavit of the commission of any crime of which he has jurisdiction lodged with a justice of the peace, he shall issue a warrant for the arrest of any offender returnable forthwith or on a certain day to be named, and shall issue subpoenas for witnesses as in civil cases, and shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides.

Since jurisdiction of the county court is dependent upon that of the justice of the peace, the jurisdictional infirmity occasioned by lack of an authorizing affidavit rendered void all proceedings in the trial court.

The Supreme Court of Mississippi dismissed the jurisdictional point by reference to state statutes which permit amendments to affidavits in circuit rather than justice courts and to the "universally accepted . . . rule of law" providing that properly certified records import absolute verity and are the "sole, conclusive and unimpeachable evidence of the proceedings in the court below." This entire rationale is relevant if it were petitioner, rather than the state, who failed to object to the jurisdiction of the county court. Further, the opinion below ignores the fact that the record, certified as the original record of the justice of the peace court, in fact, contained no affidavit issued on March 3, 1962, the day of petitioner's arrest.

Reliance by the court below upon *Whittington v. State*, 218 Miss. 631, 67 So. 2d 515 is misplaced. In the *Whittington* case, jurisdiction of the circuit court, challenged first before the Supreme Court of Mississippi because of the absence of the justice of the peace's certificate, was defeated because of defendant's failure to make that challenge before the circuit court. In discussing the effect of Section 1987 of the Mississippi Code of 1942 Ann. Rec.,

which provides that objections to defects in the record of the justice court be made in the circuit court, the Supreme Court of Mississippi said at page 517:

Although under Sections 1199 and 1200, Code 1942, it is still mandatory that the justice of the peace or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case, on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law.

Since *Whittington v. State*, *supra*, has been declared by the court below to embody the law of Mississippi, the conclusive presumption of the verity of the record of the justice court is binding upon the state which failed to question the accuracy of the record and relied entirely on the theory that an "amended" affidavit was a sufficient basis for jurisdiction (R. 64).

Conversely, petitioner objected continuously to the absence of the original affidavit (R. 8-9; 62-67; 113; 182). Moreover, the trial court declined to issue a subpoena for acquisition of all original records, thereby compounding the infirmity implicit in the record before the trial court.

Mississippi has held that "the transcript . . . before the court . . . complied in every respect with the law" and that law, which appears in Sections 1200 and 1205 of the Mississippi Code of 1942, Ann. Rec. refers to appeals from the justice courts and to the proper transmission of certified records; each section specifically refers to "all the original papers in the case." That the law was complied with is conclusive upon the state; all original papers were transmitted to the county court and that record may not be impeached by the state nor judicially corrected by the court below. Reliance by the Supreme Court of Mississippi

on the justice's notation, "General Affidavit: 3/3/62" (R. 1) is, in accordance with its construction of state law, conclusively contradicted by the certification of one general affidavit dated March 14, 1962. That affidavit recites no amendment nor does the record supply any testimony, under oath, that any such amendment was made.

The sole testimony of the existence of an original affidavit, elicited from deputy sheriff Nassar of Bolivar County (R. 58; 61) is contradicted by one of petitioner's attorneys. The attorney, in his quest to locate an original affidavit and ascertain the charge against his client, conferred with the justice of the peace who had no knowledge of petitioner's arrest and "had not signed an affidavit and knew nothing of it" (R. 156). The testimony of the deputy sheriff is inconsistent with other portions of the record. The complaining witness could not remember whether he signed a statement, a warrant or an affidavit (R. 53-54). The record of the police operator indicated that petitioner's car was identified at 5:56 p.m. and that deputy sheriff Nassar reported issuance of a warrant for petitioner's arrest at 6:04 p.m. (R. 88-89). Apparently, within the eight intervening minutes, the deputy sheriff drew the warrant and affidavit, took the affidavit to the home of the justice of the peace some five blocks from the police station to have it stamped and then returned to the city hall and advised the Clarksdale authorities. Moreover, the District Attorney admitted that "Mr. Nassar might not know how to prepare a proper affidavit" (R. 64).

Under Mississippi law, defects in a transcript of a record may not be supplied by oral testimony. In *Anthony v. Basset*, 172 Miss. 206, 159 So. 854, the Supreme Court of Mississippi held that where the transcript did not show certain promissory notes to have been brought before the justice of the peace, admission of the notes into evidence was error. At page 854, the court stated:

An incomplete transcript of the record of proceedings in a justice court may be corrected and

completed by a certiorari for a more perfect record . . . And, an alleged defect in the transcript of the record or omission of essential parts thereof cannot be supplied by oral testimony at the trial in the circuit court.

Conflicting testimony as to the existence of an original affidavit cannot therefore be the decisive factor since both the trial court and the state appellate court are bound, under the law of Mississippi, by the record certified by the justice court.

Acceptance of the theory of an amended affidavit by the court below violates petitioner's rights under the Due Process Clause of the Fourteenth Amendment and casts serious doubt upon the impartiality of that tribunal. With the sole exception of *Winfield v. City of Jackson*, 89 Miss. 272, 42 So. 183, amendments have been allowed only when the original affidavit was before the court. These amendments have related to dates, phrases and signatures, but in no other case has an amendment been allowed where the original affidavit was missing. There is a significant difference between adding dates, phrases or signatures to an existing, but incomplete affidavit, and the denomination of a new affidavit, executed eleven days after an arrest, as an amendment to an absent original, the disappearance of which was never explained (R. 8-9; 66-67; 155).

In *Winfield v. City of Jackson*, *supra*, proof of the existence and contents of the missing affidavit was supplied by the police justice who had issued the original and tried the cause. In the case at bar, the state failed to follow this procedure and the trial court declined to authorize a subpoena to acquire the alleged original. Affirmance by the Supreme Court of Mississippi was, therefore, contrary to state law.

The Mississippi Supreme Court has consistently recognized the duty of the justice of the peace to transmit all

original process and papers and has entertained certiorari proceedings to require performance of that obligation. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010. The state policy is expressed in *Boyd v. State*, 164 Miss. 610, 145 So. 618, where police had searched for and seized intoxicating liquor near defendant's home. Upon failure of the state to produce the original warrant and the original affidavit, the court in declaring how the omission might be cured, stated at page 619:

There was no sort of evidence tending to show the contents of the affidavit and the warrant, and whether or not they complied with the law. It is not every affidavit and warrant that will authorize a search If the affidavit and search warrant have been lost, the proof must show not only the loss but also substantially their contents.

Prosecution of petitioner began with the affidavit charging the crime. *Ratcliff v. State*, 199 Miss. 866, 26 So. 2d 69. The record before the trial court having contained an affidavit of the Bolivar County Prosecutor dated March 14, 1962, forecloses the issue of a missing and unaccounted for affidavit, prerequisite to any valid arrest on March 3, 1962. Section 1832 of the Mississippi Code of 1942, Ann. Rec. provides that a warrant for arrest shall issue on affidavit of the commission of a crime lodged with the justice of the peace. The Supreme Court of Mississippi has declared that a valid arrest requires a warrant unless the offense was committed in the presence of the arresting officer. *Butler v. State*, 135 Miss. 885, 101 So. 193.

The arrest of petitioner, contrary to state law, also violated Section 23 of the Constitution of Mississippi and the Fourth Amendment of the United States Constitution which require that no warrant shall issue except upon probable cause supported by oath or affirmation. Probable cause, sufficient to sustain an arrest, must conform to federal constitutional requirements. *Aguilar v. Texas*,

supra; *Ker v. California*, *supra*. Cf. *Giordinello v. United States*, 357 U. S. 480. Those requirements are defined in *King v. Gokey*, 32 F. 2d 793 (N. D. N. Y. 1929), where the sufficiency of an affidavit was attacked on the ground that no facts were alleged and that the affiant had no personal knowledge of the statements in the affidavit. The court stated at page 794:

The commission of a crime must be shown by facts positively stated before a commissioner has jurisdiction to issue a warrant of arrest. This protection is guaranteed to every person by the Constitution . . . through the provision that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation' . . . If the complaint is made on information and belief, it must give the grounds of belief and sources of information. A complaint not based on the complainant's personal knowledge, and unsupported by other proof, confers no jurisdiction upon the commissioner to issue a warrant.

The essential similarity between Section 23 of the Mississippi Constitution and the Fourth Amendment was acknowledged by the Supreme Court of Mississippi in *Orick v. State*, 140 Miss. 184, 105 So. 465, and in *Falkner v. State*, 134 Miss. 253, 98 So. 601, that court reaffirmed its determination to uphold the Constitution of the United States. Moreover, in *Moore v. State*, 138 Miss. 116, 103 So. 483, the court below concluded that probable cause was a necessary prerequisite to a lawful arrest. Although the minimum requirement of an affidavit valid under Mississippi law has been "information and belief," *State v. Quintini*, 76 Miss. 498, 25 So. 365, the facts of the case at bar must be evaluated in the light of the *Ker* and *Aguilar* decisions. The affidavit upon which petitioner was tried, which recited neither personal knowledge nor information and belief is therefore insufficient and invalid under state and federal law. Condonation, by the court below, of the state's failure to adhere to either state or federal constitutional principles was error and requires reversal by this Court.

Prior to its opinion in this case, the Supreme Court of Mississippi had held that the certified record transmitted from the justice court imported absolute verity and that it complied in every respect with the law. The authenticity of that record was held to be conclusive upon all parties, *Whittington v. State*, *supra*. Additionally, the court below had refused to allow defects in the transcript of the record to be corrected by oral testimony, *Anthony v. Bassett*, *supra*. Enunciation of the thesis that an amended affidavit, which bears no indication of the fact of amendment, can be substituted for a missing affidavit in order to support both the jurisdiction of the trial court and the validity of petitioner's arrest, applied in the case at bar, is a violation of the equal protection clause of the Fourteenth Amendment. The Mississippi law prohibits the correction of a defective record by oral testimony and yet the court below based its findings on representations of counsel which were not even supplied under oath. State action whereby the law is administered on a disparate basis is condemned by the Fourteenth Amendment's equal protection clause. *Yick Wo v. Hopkins*, 118 U. S. 356; *Buchanan v. Warley*, 245 U. S. 60; *Brown v. Board of Education*, 347 U. S. 483; *Shelley v. Kraemer*, 334 U. S. 1; *Gayle v. Browder*, 352 U. S. 903.

The requirement that a defendant in a criminal case be tried in accordance with due process of law is a basic element of the Fourteenth Amendment. *Frank v. Mangum*, 237 U. S. 309, 326; *Devine v. Hand*, 287 F. 2d 687 (10th Cir. 1961); *Alexander v. Dougherty*, 286 F. 2d 745 (10th Cir. 1961); *Odell v. Hudspeth*, 189 F. 2d 300 (10th Cir. 1951). In *Simons v. United States*, 119 F. 2d 539 (9th Cir. 1941), the court defined due process of law at page 544:

Due process of law in a criminal proceeding has been defined as consisting of 'a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found guilty.

Refusal of the trial court to require production of an alleged original affidavit and to grant process whereby original records of the justice court, if any, might have been acquired deprived petitioner of his right to know "the contents of the affidavit and the warrant, and whether or not they complied with the law." *Boyd v. State, supra*. This omission, in view of the state's failure to show the contents of any original affidavit and warrant, is indicative of the lack of an "impartial tribunal" and an "accusation in due form." The court below, after admitting that "a justice of the peace has no jurisdiction of a criminal charge until an affidavit has been lodged with it (154 So. 2d at 292; R. 238), relied on the existence of a missing original affidavit and the liberality of Mississippi amendment procedure. An amended affidavit necessarily presupposes an original and the existence of an original was not established as required by the law of the state. This omission, in view of the Mississippi statutory requirements, fatally impairs the jurisdiction of the justice court and the derivative jurisdiction of the trial court.

The necessity for a criminal court of competent jurisdiction has been noted by this Court. In *In re Bonner*, 151 U. S. 242, Mr. Justice Field said of the jurisdiction of criminal courts at page 256:

We . . . are of the opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms.

And in *Frank v. Mangum, supra*, this Court defined the due process requirement of the Fourteenth Amendment at page 326:

As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings, as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, *before a court of competent jurisdiction*, according to established modes of procedure, is 'due process' in the constitutional sense. (Emphasis added.)

The conviction of petitioner by a court lacking jurisdiction, in violation of his rights under the due process and equal protection clauses, considered together with the disparate application of Mississippi law and his unlawful arrest in further violation of rights accorded by the Fourteenth Amendment and by the Mississippi Constitution and the laws of Mississippi, is more than sufficient to require reversal of the decision of the court below.

III

Conviction of Petitioner Was Procured by An Abuse of Process And the Proceedings Below, in Their Entirety, Lacked Fundamental Fairness in Violation of the Fourteenth Amendment to the United States Constitution.

Throughout the conduct of the investigation, arrest and trial of petitioner by the State of Mississippi, there persists the recurrence of abbreviated procedural and substantive due process designed to procure a swift conviction without even token regard for constitutional restraints placed upon the state by the Fourteenth Amendment. Initially, an inconsistent description of a Negro male driving a black car, wearing a variety of apparel, was converted into a positive description of petitioner by a Clarksdale policeman, who was familiar with petitioner, his automobile, and his activities, and who enthusiastically assisted the Bolivar

County official to whom the complaint was made (R. 43; 49-51; 72; 74; 78-79; 159). The expedient, but limited investigation, was followed by petitioner's arrest and the illegal search of his automobile while he was in custody.

Proceedings in the trial court were, at best, difficult. Prior to commencement of trial, petitioner's motion to subpoena evidence necessary to his defense were summarily denied (R. 4-6). Similarly, the court refused a request to desegregate the courtroom (R. 10). Trials of Negro defendants in segregated rural Mississippi courtrooms are not the best of all possible forums for the administration of impartial justice. Nor do they provide a conducive environment within which counsel might concentrate exclusively on the trial of a cause.

During the examination of the complaining witness, petitioner discovered the existence of an original statement, tape recorded by the Coahoma County Attorney while investigating a crime over which he had no jurisdiction. The trial court which required that the tape be reduced to written form before it would consider any use to be made of the statement by petitioner, then resisted all efforts to accomplish its request expeditiously (R. 46; 53-55; 102).

Petitioner's efforts to acquire original statements and the original warrant met with consistent judicial rebuffs (R. 8-9; 45-48; 53-55; 62-67) and the motion for a directed verdict, based upon the admission of illegally seized evidence, which raised critical constitutional questions was immediately rejected without so much as a pause for consideration (R. 113). Any doubt as to the attitude of the trial court is dispelled by its denial of a final motion for new trial before counsel could even state that motion (R. 182).

The persistent addressing of Negro witnesses by their first names, unsuccessfully objected to (R. 120; 126; 150), was characteristic of the intolerance for constitutional claims and constitutional rights which pervaded the trial.

The failure of the trial court to require production of the original affidavit was aggravated by the refusal to subpoena all original records. These errors and the unlawful arrest of petitioner sanctioned by the Supreme Court of Mississippi—whose opinion rationalized a clear abridgement of petitioner's due process rights—are a consequence of procedures followed by state authorities which accord less than token regard for the rights of an accused. Such disregard evidences a concept of due process of law limited to abstract theory and devoid of substantive application.

The facts found below are not controlling on appeal. Evaluation of basic constitutional issues requires this Court to independently evaluate the evidence set forth in the record and to determine the merit of the conviction upon that assessment. *Blackburn v. Alabama*, 361 U. S. 199; *Spano v. New York*, 360 U. S. 315; *Napue v. Illinois*, 360 U. S. 264; *Niemotko v. Maryland*, 340 U. S. 268, 271; *Feiner v. New York*, 340 U. S. 315, 316, 322; *Watts v. Indiana*, 338 U. S. 49, 50-51; *Pierre v. Louisiana*, 306 U. S. 354, 358; *Norris v. Alabama*, 294 U. S. 587, 589, 590 cf. *Ng Fung Ho v. White*, 259 U. S. 276, 284, 285.

Examination of the record below establishes, beyond question, that on March 3, 1963, petitioner was in Clarksdale between 4:45 and 5:20 p.m. at the Delta funeral home and at his own home between 5:30 and 7 p.m. (R. 114-115; 117-149; 162). The complaining witness was importuned between 5:30 and 5:56 p.m. in a car travelling at a rate of speed between 40 and 45 miles per hour between the intersection of Routes 61 and 49 outside of Clarksdale and the bus station in Shelby, Mississippi, a distance of twenty-two miles (R. 34; 159). At maximum speeds, i.e., 60 miles per hour which is consistent with the law, that ride requires 30 minutes (R. 140). At best, to drive from the intersection to Shelby and to return to the Clarksdale city limits, requires one hour. The call to ascertain the owner of the license was made at 5:56 p.m. Some five to

ten minutes before 5:56 p.m. a black car, similar to that in which Eilert was riding, was seen to turn north from Shelby toward Alligator and Clarksdale (R. 25; 69). A round trip, therefore, required a driver to be on the highway between 5:10 and 6:20 p.m. At 5:15 p.m., petitioner was talking to three persons in an office in Clarksdale and from 5:30 or 5:35 p.m., until his arrest at 7 p.m., he was in the presence of his wife, daughter and either of two guests at his home. Descriptions of the driver were both tall and short, wearing a sweater, not wearing a sweater or perhaps wearing a sweater under a coat (R. 43; 49-51; 159).

Eilert's driver worked in a liquor store in Alligator, Mississippi, mid-way between Clarksdale and Shelby (R. 38). Although he did not know how long his trip from Memphis to Clarksdale took and was not wearing a watch, Eilert was certain that he arrived at the intersection at 5 p.m. and got a ride to Shelby at 5:30 p.m. (R. 30; 33-34). Based upon this testimony, within twenty-six minutes, Eilert was driven some twenty miles, through towns at a speed not exceeding 40-45 miles per hour, experienced the alleged incident with the driver, made two telephone calls, walked to the Shelby police station, and gave an oral statement to the authorities.

The case before this Court is one of identity. A general and inconsistent description of a Negro male by a slow and poorly schooled youth to whom all Negroes look alike was converted into a positive description of petitioner by police officers who made no effort to investigate anyone other than petitioner (R. 35; 84; 159).

Petitioner was charged with violation of Section 2089.5, Mississippi Code of 1942, Ann. Rec., one of a group of laws passed to implement official state resistance to desegregation enunciated in *Brown v. Board of Education*, *supra*. Mississippi's policy of racial segregation is so blatant and notorious that it has been judicially noticed

by the Fifth Circuit Court of Appeals. See *United States v. City of Jackson*, 318 F. 2d 1 (1963); *Bailey v. Patterson*, 323 F. 2d 201 (1963).

Article 6, Section 169 of the State Constitution provides that "all prosecutions shall be carried on in the name and by authority of the 'State of Mississippi'." And it is in the name and by the authority of the State of Mississippi that a certified copy of justice records contains no original or even competent affidavit rendering any arrest thereunder invalid; a search of an automobile made without a warrant after an accused is taken into custody produces evidence which corroborates the testimony of a witness whose original statement conveniently omits any reference to existence of that evidence; and a clearly illegal search and seizure was accorded a *pro forma* denial of a motion for directed verdict. Assuming the trial court required time to consider the merits of the constitutional issue, a motion for new trial was treated with an equally *pro forma* denial.

In *Chambers v. Florida*, 309 U. S. 227, this Court declared at page 241:

Under our constitutional system, courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.

No higher duty, no more solemn responsibility, rest upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution of whatever race, creed or persuasion.

In its first opinion, the court below determined those issues which are dispositive of the questions raised by the case at bar. An unconstitutional search was committed by state authorities. It produced the only evidence which

could sustain the conviction, rendering admission of that evidence such a fundamental denial of rights as to negate a fair and impartial trial guaranteed by the federal constitution. Under these circumstances, neither waiver nor the competence of counsel mitigate against the court's obligation to accord and insure fundamental fairness.

Petitioner's civil rights activities, an anathema in Mississippi, were well known to the police official who assisted in securing appellant's arrest (R. 78), and undoubtedly equally well known in the forum of the trial. The Suggestion of Error filed by the state Attorney General, in which the affiliation of petitioner and his counsel with the N.A.A.C.P. were solicitously noticed to the court below, not only erroneously implied that no objection was made to the admission of the unconstitutional evidence but suggests the political interest of the state in securing a conviction and the recourse to unusual procedures to assure that desired result (R. 213).

The inadequacy of the evidence upon which the conviction of petitioner rests, together with the Suggestion of Error procedure utilized by the Attorney General of the State of Mississippi, are persuasive examples of the use of state process as a punitive measure and as an effort to discourage petitioner's civil rights and N.A.A.C.P. activities and to intimidate similar efforts by other Negroes or civil rights workers in the State of Mississippi.

State action which enforces segregation "ingeniously or ingenuously" and seeks to stifle civil rights activities, the dissemination of dissident views and the right of persons to associate together to achieve these goals are as violative of the Fourteenth Amendment as are the less disguised acts of the state to circumvent constitutional proscriptions. *NAACP v. Button*, 371 U. S. 415; *NAACP v. Alabama*, 357 U. S. 449; *Edwards v. South Carolina*, 372 U. S. 229; *Peterson v. City of Greenville*, 373 U. S. 244;

Cooper v. Aaron, 358 U. S. 1. Where fundamental due process rights have been subverted, it falls to the courts to search the record and review the proceedings so that the individual, whose life or liberty is at stake, is protected and accorded those safeguards promised him by the United States Constitution.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that the conviction of petitioner be reversed and that all charges against him be dismissed.

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